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In The
Supreme Court of the United States
October Term, 1982

CRISPUS NIX, Warden of the Iowa State Penitentiary,
Petitioner,

vs.

EMMANUAL CHARLES WHITESIDE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. Whether criminal defense lawyers provide ineffective assistance of counsel by persuading their client not to commit perjury at his trial when their successful effort to prevent him from lying on the stand wins unanimous praise from the state supreme court and the conduct of the attorneys does not prejudice their client at trial.

2. Whether criminal defense lawyers, who, as officers of the court, admonish their client that they will take steps necessary to prevent him from committing perjury, violate their client's right to testify when the client subsequently abandons the perjury scheme and takes the stand in his own defense.

3. Whether criminal defense lawyers, who privately and confidentially persuade their client not to commit perjury on the stand, act in a fashion which causes a violation of their client's right to due process of law when the judge and jury at his state court trial are not informed of the defendant's abandoned perjury plan.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (Pet. App. A1-21) is reported at 744 F.2d 1323 and the order denying rehearing en banc (Pet. App. A22-34) appears at 750 F.2d 713. The unpublished opinion of the United States District Court for the Southern District of Iowa, *Whiteside v. Scurr,* Civil No. 81-246-C (S.D. Iowa 1981) appears in the appendix

accompanying the petition for certiorari (Pet. App. A41-43). The opinion of the Iowa Supreme Court (Pet. App. A35-40) may be found at 272 N.W.2d 468.

JURISDICTION

The Court of Appeals entered its judgment in this case on September 19, 1984. (Pet. App. A1.) The Petitioner filed an application for extension of time in which to file a petition for writ of certiorari in order to seek rehearing en banc from the Court of Appeals before filing a petition for certiorari. On November 13, 1984, Justice Blackmun entered an order extending the time for filing a petition for writ of certiorari until February 16, 1985. (Pet. App. A44.) The Petitioner filed a petition for certiorari within the time period as extended by Justice Blackmun in his November 13, 1984, order. The Court granted the petition for certiorari on April 15, 1985. The Court's jurisdiction is invoked under 28 U.S.C. Section 1243(1).

CONSTITUTIONAL, STATUTORY, AND PROFESSIONAL RESPONSIBILITY PROVISIONS INVOLVED

Fifth Amendment, United States Constitution

> No person shall be . . . compelled in any criminal case to be a witness against himself, nor deprived of life, liberty, or property without due process of law. . . .

Sixth Amendment, United States Constitution

In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence.

Fourteenth Amendment, United States Constitution

No state . . . shall . . . deprive any person of life, liberty, or property without due process of law.

United States Code Title 28, Section 2254(d)

In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to a judgment of a State Court, a determination after a hearing on the merits of a factual issue . . . shall be presumed correct . . .

Iowa Statutes

Section 721.1 (1977)

If any person, on oath or affirmation lawfully administered willfully and corruptly swear or affirm falsely to any material matter in any proceeding in any court of justice . . . he is guilty of perjury. . . .

Section 721.2 (1977)

If any person procures another to commit perjury, he is guilty of subornation of perjury. . . .

Iowa Code of Professional Responsibility

Canon 4: A Lawyer Should Preserve the Confidences and Secrets of a Client.

Disciplinary Rule 4-101;

(C) A lawyer may reveal;

• • •

(3) The intention of his client to commit a crime and the information necessary to prevent the crime.

Canon 7: A Lawyer Should Represent A Client Zealously Within the Bounds of the Law

Disciplinary Rule 7-102;

(A) In his representation of a client, a lawyer shall not;

* * *

(4) knowingly use perjured testimony or false evidence.

STATEMENT OF THE CASE

On February 8, 1977, Calvin Love was stabbed to death in connection with a drug transaction in his apartment in Cedar Rapids, Iowa. The record reveals that Love and his girlfriend received a late night visit from Whiteside, who was armed with a knife, and two associates. (App. 10, 49.) Whiteside and Love became involved in a bedside argument over drugs. (App. 11-12.) When Love attempted to rise from his bed, Whiteside inflicted a deep and fatal gash through the chest of Love with a knife. (App. 14.)

The state charged Whiteside with murder in connection with the death of Love. The Iowa District Court appointed Thomas M. Horan and Timothy S. White to represent Whiteside. (Pet. App. A46.) Whiteside "didn't feel comfortable" with Horan and White, who were former prosecutors (Pet. App. A58), and sought to have Thomas L. Koehler replace them. An associate in Koehler's law firm, however, had already undertaken to represent Derrick Doolin, who was also present at the scene

at the time of Love's murder. (Pet. App. A46-48.) Notwithstanding the potential conflict of interest, Whiteside adamantly insisted on representation by Koehler. Only after two court hearings and numerous consultations with White, Horan, and Koehler, was Whiteside finally convinced to accept representation from Gary L. Robinson. (Pet. App. A53.)

Whiteside consistently told his lawyers as they prepared his defense that he did not actually see a gun in Love's possession, but he was nevertheless convinced that Love had a gun. (Pet. App. A79.) None of the three eyewitnesses to the crime saw a gun (App. 19, 39, 44), however, and a police search in the small apartment conducted immediately after the incident revealed no weapon. (App. 26.) Robinson, after conducting a thorough pretrial investigation, came to the conclusion that Love in fact did not have a gun at the time of the homicide. (Pet. App. A78-82.)

About a week prior to trial, Robinson and an associate, Donna Paulsen, were reviewing questions they had written in preparation for trial. In response to one of the questions at the practice session, Whiteside shocked his lawyers by stating that he intended to testify that he had seen something "metallic" just before he stabbed Love. When Paulsen asked him why he had never claimed that before, Robinson recalled that Whiteside declared, "in Howard Cook's case, there was a gun. If I don't say I saw a gun, I'm dead." (Pet. App. A85.)

At a hearing on Whiteside's motion for a new trial, Robinson stated that he responded to the unexpected development by explaining to Whiteside that it was not

necessary for a gun to be present in order to establish self defense, and that to claim falsely that he actually saw a gun would be perjury. Robinson recalled that he told his client that he and his associate, "as officers of the court, we would be suborning perjury if we allowed him to do it" and admonished him that if he committed perjury "it would be my duty to advise the Court what he was doing." (Pet. App. 85.) Robinson also testified that he told his client that if he persisted, he would "ask the court for permission to withdraw" (Pet. App. 88) and that he "probably would be allowed to impeach that particular testimony" if Whiteside actually perjured himself on the stand. (Pet. App. A85.)

Whiteside also testified at the post-trial hearing. He told the court that while he wouldn't say he had a conflict with his attorney over his proposed testimony, "I got the impression at one time that maybe if I didn't go along with what was happening, that it was no gun being involved, maybe that he will pull out of my trial." (Pet. App. A70.) Whiteside made no mention of "threats" by Robinson to advise the court of false testimony or testify against him.

Whatever the character of Robinson's admonitions, Whiteside elected to take the stand at trial and not falsely claim that he actually saw a gun on the person of Calvin Love. After the jury retired, Whiteside advised the court that he was satisfied with his lawyers. (Pet. App. A74.) The jury convicted him of second degree murder. Whiteside then announced that he was dissatisfied with his lawyers by filing a motion for a new trial which alleged, in part, that Robinson provided ineffective assistance of counsel by coercing him to alter his testi-

mony. The state district court found the facts to be as testified by Robinson and co-counsel Paulsen and denied the motion. (App. 56.)

Whiteside appealed to the Iowa Supreme Court, which upheld the conviction. On the issue of Robinson's efforts to prevent Whiteside from testifying that Love had a gun, the Court affirmed the finding of the trial court that counsel properly refused to be a partner in a dishonest and deceitful scheme. *State v. Whiteside,* 272 N.W.2d 468, 470 (Iowa 1978). (Pet. App. A37.)

Whiteside then filed a habeas corpus action in federal court. The district court, accepting the state court's factual finding that Whiteside intended to testify falsely, dispatched Whiteside's claim with the succinct holding that because there is no constitutional right to perjure oneself, Whiteside was not entitled to relief. *Whiteside v. Scurr,* Civ. No. 81-246-C, at 2 (S.D. Iowa 1981). (Pet. App. A43.)

The United States Court of Appeals for the Eighth Circuit reversed. While the court became the third tribunal to accept the factual finding of the state court that Whiteside was proposing to testify falsely, 744 F.2d at 1338 (Pet. App. A8), the panel nevertheless held that Whiteside's attorney, through his admonitions to his client, had deprived Whiteside of effective assistance of counsel, due process of law, and a constitutionally-based right to testify on his own behalf. (Pet. App. A1-21.) The Court further held that because Whiteside's lawyers had an actual conflict of interest with their client, no showing of prejudice was required in order to reverse the conviction. 744 F.2d at 1330. (Pet. App. 13.)

The state's suggestion for rehearing en banc was denied by a five to four margin. Judge John R. Gibson, joined by three colleagues, wrote a dissenting opinion which, citing *Strickland v. Washington,* — U.S. —, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), argued that because no prejudice to the petitioner had been demonstrated, the petition for writ of habeas corpus should be denied. *Whiteside v. Scurr,* 750 F.2d 713, 714-716 (8th Cir. 1984) (*reh. denied, en banc*). (Pet. App. A26-30.) Judge Fagg, also joined by three judges, wrote in a separate dissent that ineffective assistance of counsel does not occur when an attorney convinces his client to testify truthfully in a criminal proceeding. *Id.,* at 717-719. (Pet. App. A30-34.)

The Court of Appeals denied a stay of mandate pending determination of a petition for certiorari to this Court. Upon application by the petitioner and after the filing of a response from the respondent, Justice Blackmun granted a stay pending the timely filing and ultimate disposition of a petition for certiorari by this Court. (Pet. App. A44.) On April 15, this Court granted the petition.

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SUMMARY OF ARGUMENT

This case presents the question of whether a state court criminal conviction may be overturned because of the successful effort by a defendant's lawyers to prevent their client from committing perjury at trial.

The facts are especially important to the resolution of the issue. The Respondent told his lawyers that he intended to testify falsely at his upcoming trial. His

lawyers responded with admonitions to their client. The jury at no time learned of the perjury discussion, and the only impact of the admonitions on the trial itself was the defeat of the perjury plan.

The Respondent's lawyers zealously represented him at trial, and the defendant testified on his own behalf. After the jury retired, the defendant advised the state trial court judge that he was satisfied with his lawyers' performance. After conviction, the Respondent launched an attack on his lawyers' efforts to prevent him from committing perjury.

Given these facts, the Respondent's state court criminal conviction is not subject to attack on the ground that his attorneys violated his right to effective assistance of counsel, due process of law, or right to testify on his own behalf. Pretrial admonitions confidentially given by a lawyer to a client who unambiguously announces the intention to commit perjury are not constitutionally infirm where the only impact of the admonitions is to prevent the client from committing the crime of perjury at trial. *United States v. Morrison,* 449 U.S. 361 (1981).

In addition, the use of admonitions by the Respondent's lawyers in this case cannot be considered "outside the wide range of professionally competent assistance." *Strickland v. Washington,* — U.S. —, 104 S.Ct. 2052, 2069, 80 L.Ed.2d 674, 698 (1984). Under our federal system, a state may permit criminal defense lawyers to admonish a perjury-determined client that they will withdraw and inform the court if their client insists on committing the crime of perjury.

The additional admonition of the Respondent's attorney that if the client persisted in the perjury plan, the lawyer would probably be allowed to impeach his false testimony is not constitutionally defective under the facts and circumstances of this case. Initially, the Court's characterization of the attorney's words as a "threat to testify" is very doubtful. The statement can easily be construed not as a threat to take the stand as a rebuttal witness, but simply to correct by cross-examination of one's own client any misimpressions that might have been caused by false testimony.

In any event, the impeachment admonition was entirely proper and consistent with state and federal law. Under Iowa law, a client's perjury plan is not protected by attorney-client privilege. *Committee on Professional Ethics, Etc. v. Crary,* 245 N.W. 2d 298, 306 (Iowa 1978). Even if some aspects of the attorney-client privilege are constitutionally protected, the constitutional cloak does not extend to confidences regarding firm intentions to commit a future crime, including the crime of perjury at a criminal trial.

The "threat to testify", along with the lawyer's warning to advise the court of the Respondent's perjury proposal, do not provide a basis for reversal of his conviction even if they are constitutionally infirm. The record shows that the Respondent did not remember, let alone rely upon, either admonition.

———o———

ARGUMENT

I. Pretrial Admonitions Confidentially Given By A Lawyer To A Client Who Has Unambiguously Announced To Counsel His Intention To Commit Perjury Are Not Constitutionally Infirm Where The Only Impact Of The Admonitions Is To Prevent The Client From Committing The Crime Of Perjury At Trial.

In considering whether the pretrial admonitions in this case provide a constitutional basis for a federal court to vacate Respondent's state court conviction, the case must be viewed through a lens established by four key facts.

First, Emmanual Charles Whiteside told his lawyers that he intended to testify falsely on the stand at his upcoming trial.[1] The controversy thus involves a hard-core, unadulterated attempt by a criminal defendant charged with first degree murder to "beat the system" by committing the crime of perjury at trial. The case must not be confused with and bears no resemblance to a situation where an attorney, acting as judge and jury rather than zealous advocate, refuses to defend a client

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[1]The state trial court found the facts "to be as testified to by Ms. Paulsen and Mr. Robinson." (App. 56.) The Iowa Supreme Court, in affirming the state trial court, held that "counsel was convinced with good cause to believe [Respondent's] proposed testimony would be deliberately untruthful." *State v. Whiteside*, 272 N.W.2d 468, 471 (Iowa 1978). (Pet. App. 37.) These factual determinations are fairly supported by the record and are therefore presumptively correct. *Sumner v. Mata*, 449 U.S. 539, 544 (1980); 42 U.S.C. § 2254(d).

effectively simply because the lawyer is inclined to disbelieve the client's side of the story.[2]

Second, the lawyer[3] in this case gave the admonitions to his client in a confidential pretrial conference. Neither the judge nor the jury at the trial which resulted in Whiteside's conviction had the slightest knowledge of the perjury discussion. This case does not present the troublesome situation where the judge or factfinder is arguably unduly prejudiced by knowledge that the attorney of the accused has doubts about the client's version of events.[4]

Third, the only impact of the admonitions on the trial itself, the main event in the criminal process, was the prevention of perjury by the accused. The admonitions did not prevent Whiteside from testifying fully about the events that led to the death of Calvin Love.[5] In addition, there is no claim, aside from preventing the perjury, that Whiteside's attorneys mounted anything less than a zealous defense at trial or that the discussions

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[2]*See United States ex rel. Wilcox v. Johnson*, 555 F.2d 115, 122 (1977) (counsel seeks to withdraw without firm basis for belief that client was prepared to commit perjury).

[3]Lawyer Gary Robinson made the admonitions to Whiteside in the presence of another lawyer, Donna Paulsen. (App. 84.) Because the admonitions were spoken by Robinson, the singular term "lawyer" is used in reference to the admonitions even though two lawyers were present and participating in the confrontation.

[4]*See Lowery v. Cardwell*, 575 F.2d 727, 731 (9th Cir. 1978); *United States ex rel. Wilcox v. Johnson*, *supra* note 2, at 117 (client declines to take stand for fear of being forced to proceed without representation).

[5]*Contrast United States v. Curtis*, 742 F.2d 1070, 1076 (7th Cir. 1984) (lawyer refuses to place perjury-determined client on witness stand).

over the perjury issue so impaired the attorney-client relationship that effective representation at trial by his attorneys was not a realistic possibility.

Fourth, after the jury had retired, Whiteside informed the state court trial judge that he was satisfied with his lawyers' performance. (Pet. App. A74.) His sandbag-style complaint arose only after the jury returned with an unfavorable verdict.

In light of the accused's unambiguous declaration of intent to commit perjury, the confidential nature of his lawyer's admonitions, the extremely limited impact of the admonitions on the trial of the accused, and the accused's in-court statement of satisfaction with his lawyers after the jury retired, the Petitioner believes that the opinion and judgment of the Court of Appeals must be reversed.

A. The Validity Of A State Court Criminal Conviction Is Not Undermined By Pretrial Events That Do Not Taint The Trial Of The Accused.

The purpose of the due process guarantee of the right to effective assistance of counsel in state court proceedings is to advance the constitutional policy of producing reliable verdicts at criminal trials. The seminal due process cases involving Sixth Amendment rights in state court proceedings uniformly emphasize the role of counsel in promoting the truthfinding process of the adversary system. *See Powell v. Alabama,* 287 U.S. 45, 68-69 (1932); *Johnson v. Zerbst,* 304 U.S. 458, 463 (1938); *Gideon v. Wainwright,* 372 U.S. 335, 344-45 (1963). In *Strickland v. Washington,* — U.S. —, 104 S.Ct. 2052, 2069, 80 L.Ed.2d

674, 698 (1984), this Court recently reemphasized that "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." The Court in *Strickland* further declared that "the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as producing a just result." — U.S. at —, 104 S.Ct. at 2064, 80 L.Ed.2d at 692-93.

The only impact of counsel's challenged conduct at Whiteside's trial, however, was suppression of unquestionably false testimony. It would be absurd to argue that a lawyer who persuades his client not to commit perjury at trial eviscerates the "fundamental fairness of the proceeding" or so undermines the trial that the proceedings "cannot be relied upon as producing a just result." *Id.*

The manner in which Whiteside was prevented from committing the crime has absolutely no relevance to the validity of his criminal conviction. Whiteside had no constitutional right to commit perjury at trial. *Harris v. New York,* 401 U.S. 222, 225 (1971). While the Petitioner believes the conduct of Whiteside's attorneys in this case is above reproach, the evaluation of their conduct simply does not matter. Absent a right to commit perjury, even arguably wrongful actions by his lawyers to prevent perjury cannot be said to have "chilled" any constitutional right. The only impact of admonitions in this case was the suppression of false testimony. The District Court's summary dismissal of the ineffective assistance of

counsel argument in this case with the blunt observation that "there is no constitutional right to perjure oneself" was the correct approach. *Whiteside v. Scurr,* Civ. No. 81-246-C (S.D. Iowa, Dec. 7, 1982). (Pet. App. A43.)

Support for this conclusion may be found in *United States v. Morrison,* 449 U.S. 361 (1981). In this Sixth Amendment case, agents of the Drug Enforcement Agency met with the accused alone on two occasions after her indictment even though the officers were aware that she had retained counsel. At the meetings, the officers disparaged her lawyer and indicated that she would gain various benefits if she cooperated with them but would face a stiff jail term if she did not. 449 U.S. at 362. The District Court overruled a motion to dismiss the indictment and the parties entered into a conditional plea bargain. The Court of Appeals reversed holding that, in light of the government conduct, the indictment should have been dismissed with prejudice.

While this Court did not condone the government's behavior, which it characterized as "egregious," 449 U.S. at 363, it nonetheless upheld the plea bargain. The Court unanimously held that cases involving Sixth Amendment rights are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe upon the competing interest in the administration of criminal justice. 449 U.S. at 364. The Court further held that extraordinary relief was not appropriate in the absence of some adverse consequence to the representation received or to the fairness of the proceedings leading to the conviction. As in *Morrison,* the challenged conviction here must be affirmed since the lawyers' conduct did not taint

the factfinding process at trial in any way. *See also United States v. Wade,* 388 U.S. 227, 240-41 (1967) (pretrial identification obtained in violation of right to counsel does not provide basis for reversal of conviction if record clearly and convincingly shows lack of taint on the factfinding process).

A different situation would be presented if a client becomes so intimidated by counsel's antiperjury admonitions that the client is afraid to take the stand and testify truthfully. Suppose, for instance, that a lawyer advises a client that the client tends to shade the truth too much. The lawyer promises to listen intently to the client's testimony at the forthcoming trial and immediately advise the court of the slightest distortion in the client's testimony. As a result of this admonitional overkill, the client is so frightened that he or she declines to take the stand and testify truthfully.[6] When the factfinder is deprived of important information, confidence in the ultimate verdict is undermined. An argument could perhaps be made in this factual setting that the lawyer provided ineffective assistance of counsel under the *Strickland v. Washington* standards.

In this case, however, the constitutional bottom line is that the pretrial admonitions had absolutely no impact at trial other than to prevent Whiteside from offering perjured testimony. Absent any legally relevant impact at trial, the question of whether actual prejudice occurred does not need to be addressed. There is not one ounce of

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[6]*Cf. United States ex rel. Wilcox v. Johnson, supra,* note 2 (client so fearful of lawyer's reaction that he decided not to testify at all).

unlawful impact to be placed in the *Strickland* scales to determine if actual prejudice occurred. Because his lawyer's confidential pretrial admonitions in this case resulted in the prevention of perjury and nothing more, they do not raise a Sixth Amendment issue regardless of their substantive content. *See Whiteside v. Scurr*, 750 F.2d at 718 (Fagg, J., dissenting).

This "no harm, no foul" approach to the pretrial client perjury issue has a strong practical justification. The rule avoids the specter of courts conducting evidentiary hearings to determine precisely what was said in private pretrial discussions where the only evidence will be competing sworn statements of the lawyer and the estranged client. Such judicial excursions into the pretrial minds of attorneys and clients would disrupt the criminal justice system by allowing hair-trigger analysis of an attorney's pretrial choice of perjury-discouraging words to provide the basis for attacking an otherwise sound criminal judgment.

As this case graphically illustrates, these collateral proceedings could be launched by a criminal defendant who expressly advises the court after the jury has retired that he or she is satisfied with the quality of representation, only to have a change of heart when the jury returns with a guilty verdict. (Pet. App. A74.) By proposing perjury, provoking admonitions from counsel, and then relenting, a cagey criminal defendant could attempt to use the Sixth Amendment to guarantee a right to two criminal trials.

The rule adopted by the Court of Appeals would also allow an unethical or incompetent attorney to inject reversible error into a proceeding by privately issuing un-

lawful admonitions. Even the most meticulous and law-abiding professional prosecutors would be totally powerless to prevent this potential snag in the criminal justice system.

In sum, the approach of the Court of Appeals will undermine the stability of jury verdicts in criminal trials where no impact on trial can be identified other than exclusion of perjured testimony. The systemic problems caused by judicial probing into the character of an attorney's perjury admonitions far outweigh any benefit that might be derived from the inquiry. *Cf. United States v. Morrison*, 449 U.S. at 364 (recognition of competing interests in administration of the criminal justice system).

B. The Admonitions Of Respondent's Lawyer Cannot Provide A Basis For Reversal Of His State Court Conviction In A Federal Habeas Corpus Proceeding On Ineffective Assistance Of Counsel Grounds Absent A Showing Of Actual Prejudice.

The Court of Appeals recognized that there is no constitutional right to commit perjury. *Whiteside v. Scurr*, 744 F.2d at 1328. (Pet. App. A8.) In reversing Whiteside's conviction, the Court did not advance the argument that Whiteside was prejudiced because he was not allowed to commit perjury at trial. Instead, the Court of Appeals, relying on *Cuyler v. Sullivan*, 446 U.S. 335 (1980), held that no showing of prejudice was required. 744 F.2d at 1330. (Pet. App. A13.) In *Cuyler*, this Court held that where a lawyer represents two or more defendants in the same criminal proceeding, there is "no need to indulge in nice calculations" as to the amount of prejudice attributed to the

conflict once it is known that "an actual conflict of interest adversely affects the lawyer's performance." 446 U.S. at 449.

1. The rule in Cuyler v. Sullivan has no application where the alleged conflict of interest does not threaten the accuracy of factfinding in a criminal proceeding.

The limited presumption of prejudice in *Cuyler* is necessary because of the inherent threat to the reliability of the factfinding process posed by multiple representation in a criminal trial. In the leading case of *Glasser v. United States,* 315 U.S. 60 (1942), an actual conflict of interest between multiple defendants inhibited an attorney from cross-examining a key witness. The attorney also felt constrained from raising an important evidentiary objection that might have aided one of his clients at the expense of another. 315 U.S. 72-74. These lapses of advocacy in *Glasser* cast serious doubt on the reliability of the ultimate result at trial.

The unfavorable impact of the actual conflict of interest on the quality of *Glasser's* legal defense was clear. It is often difficult, however, to determine precisely what effect this kind of conflict of interest has had on the factfinding process. As a result, traditional prejudice tests afford insufficient protection to a criminal defendant in many multiple representation situations. The lapses of advocacy are often of a highly subjective nature. Because of the difficulty in measuring impact on ultimate results, *Holloway v. Arkansas,* 435 U.S. 475, 490-91 (1978), a low threshold approach to the prejudice issue is necessary in

the multiple representation context to protect the integrity of the factfinding process.

The extension of *Cuyler* by the Court of Appeals to the present factual setting is unwarranted. By admonishing his client on the perjury issue, Robinson did not impair the reliability of the factfinding process at trial. He simply prevented his client from testifying falsely. The application of the low threshold prejudice test of *Cuyler* in the present case impairs the ability of the criminal justice system to protect itself from false testimony. The *Cuyler* rule should not be used as a sword to defeat its basic mission of promoting accurate results in the criminal justice system.

2. Even if Cuyler applies, the prerequisites for invoking the limited presumption of prejudice are not present.

Assuming *Cuyler* is applicable to situations where an attorney seeks to prevent client perjury, a two-pronged test must be satisfied. First, the record must reveal an "actual conflict of interest" sufficient to raise doubts about a lawyer's performance. 446 U.S. at 348. Second, there must be an "actual lapse in representation" that "actually affected the adequacy of representation." 446 U.S. at 449. Neither prong of *Cuyler* has been satisfied in this case.

a. The record reveals no actual conflict of interest.

In this case there was no "actual conflict of interest." A conflict of interest implies the collision of two legally

recognized rights. Whiteside, however, had no constitutionally or statutorily recognized right to commit perjury. *Harris v. New York*, 401 U.S. 222, 225 (1971). He also had no constitutional right to a lawyer willing to offer false evidence on his behalf.[7] *In re Branch*, 70 Cal.2d 200, 210-11, 74 Cal.Rptr. 238, 245, 449 P.2d 174, 181 (1969). As a result, Whiteside had no right that collided with the interests of his lawyers in preventing perjury. *See Whiteside v. Scurr*, 750 F.2d at 715 (Gibson, J., dissenting). (Pet. App. A27.)

The conversations between Whiteside and his lawyer also involved at best only a *potential* conflict of interest. Whiteside told his lawyers that he was prepared to lie on the stand, offering the opinion that " . . . in Howard Cook's case, there was a gun. If I don't say I saw a gun, I'm dead." (Pet. App. 85.) Had Whiteside persisted in his perjury proposal, the potential conflict might have ripened into an actual conflict of interest at trial. Instead, Whiteside, who refused to characterize the discussion between himself and his attorneys as a conflict (Pet. App. 70), "just dropped it [the perjury issue] entirely" after their brief private conversation. (Pet. App. 89.) When Whiteside decided not to press the point, the possibility of an actual conflict with his lawyers at trial was averted. Because Whiteside actually received zealous representation at trial, no actual conflict of interest was present. *See United States v. Hoffman*, 733 F.2d 596, 601-02 (9th Cir. 1984), *cert. denied* — U.S. —, 105 S.Ct. 1390, 83 L.Ed.2d 409 (1984).

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[7] If the accused repeatedly and stubbornly persists on perpetrating a fraud upon the court, no constitutional problem is raised by requiring him or her to defend *pro se*. *See infra* at 38.

b. No "lapse of advocacy" occurred that "actually affected the adequacy of representation."

If an actual conflict of interest is present, it still must be shown that the conflict produced an "actual lapse of advocacy" that "actually affected the adequacy of representation" before the limited *Cuyler* presumption becomes operative. 446 U.S. at 549. While *Cuyler* instructs that "nice calculations" regarding the amount of prejudice are not required in actual conflict of interest settings, some palpable and identifiable adverse impact at trial is an indispensable prerequisite to the limited presumption of prejudice. *Strickland v. Washington*, — U.S. at —, 104 S.Ct. at 2067, 80 L.Ed.2d at 696.

The successful efforts of Whiteside's attorneys to convince their client not to commit perjury cannot be characterized as a "lapse of advocacy" that "actually affected the adequacy of representation." In fact, the effectiveness of counsel would have been suspect had Whiteside's lawyers not vigorously opposed his proposed false testimony in light of the fact that none of the three eyewitnesses saw a gun (App. 19, 39, 44) and the police search failed to discover a weapon. (App. 26.)

From a strategic point of view, Whiteside's testimony at trial that he thought Love had a gun, though he did not actually see one (App. 54), is far more consistent with the evidence, than his proposed false claim that he actually saw a gun. If Whiteside had claimed that he actually saw a weapon, he would have faced tough cross-examination by the prosecution. Why did the three other eyewitnesses not see the gun? (App. 19, 39, 44.) Why did Love ask his girlfriend, with a wink, to "get my shit

[gun] from under the bed" if he were already armed? (App. 12.) Why did Love not simply order the intruders out of his apartment with his gun if he were armed? If there were a gun, would not the police search, even if cursory, of the small apartment have revealed it? (App. 26.) An able prosecutor would have demolished Whiteside's credibility had he claimed he saw a gun.

Under the circumstances, Whiteside had a better chance of convincing the jury that he mistakenly thought Love was armed than he did of convincing them that there actually was a gun which no one else saw and the police failed to discover. It is ironic that the Court of Appeals hoisted Whiteside's lawyers on the petard of "ineffective assistance" when their client, had he defied counsel and testified falsely, would have increased his risk of being exposed as a liar before the judge and jury who ultimately would decide his fate. *See United States v. Grayson,* 438 U.S. 41, 52 (1978) (sentencing judge may consider apparent perjury of defendant in determining length of incarceration).

C. The Respondent Has Failed To Demonstrate Actual Prejudice.

In *Strickland v. Washington,* this Court held that a conviction cannot be set aside on ineffective assistance of counsel grounds absent a showing of prejudice. — U.S. at —, 104 S.Ct. at 2067, 80 L.Ed.2d at 696. As indicated above, there has not even been an adverse impact sufficient to trigger the *Cuyler* presumption, let alone meet the higher prejudice requirement of *Strickland.* The lack of actual prejudice alone provides a clear basis for reversal of the judgment and opinion of the Court of Appeals

in this case. *See Whiteside v. Scurr,* 750 F.2d at 715 (Gibson, J., dissenting). (Pet. App. A27.)

II. The Use Of Admonitions By Whiteside's Lawyer In This Case Cannot Be Considered Conduct Outside The Wide Range Of Professionally Competent Assistance Even If Considered In Isolation From What Actually Occurred At Trial.

If this Court were willing to approach the question of the conduct of Whiteside's lawyer from an academic point of view, in antiseptic isolation from what actually occurred at trial, the Petitioner believes it should hold that Robinson's use of admonitions in this case was entirely proper from any constitutional perspective. The withdraw-and-inform admonitions employed by Whiteside's lawyer were found by the Iowa Supreme Court to be consistent with state law and the Iowa Code of Professional Responsibility. *State v. Whiteside,* 272 N.W.2d at 470. The Court of Appeals, in effect, has held that a state, as a matter of constitutional law, cannot allow its lawyers to employ withdraw-and-inform admonitions. This holding amounts to an entirely unjustified constitutionalization of controversial notions of legal ethics and seriously erodes the ability of the states to control their criminal justice systems.

Furthermore, the lawyer's admonition that he "would probably be allowed to impeach" the false testimony that Whiteside proposed to offer does not raise problems of constitutional dimension in this case. While what Robinson meant by this statement is unclear, the Petitioner believes the admonition was a reasonable expression of potential consequences if Whiteside took the stand and committed perjury. Because the issues surrounding the "threat

to testify" language are somewhat different than those raised by the withdraw-and-inform admonitions, the "threat to testify" is treated separately below.

In addition, the Respondent did not remember, yet alone rely upon, his lawyer's warning that he would advise the court or impeach his testimony if he persisted in the perjury plan. These admonitions, even if defective, cannot provide a basis for reversal of the Respondent's conviction in this case.

A. A State Criminal Justice System May Permit Criminal Defense Lawyers To Admonish Confidentially A Perjury-Determined Client That They Will Withdraw And Inform The Court If Their Client Insists On Committing The Crime Of Perjury.

As the Court of Appeals properly noted, the question of the proper role of an attorney when faced with a client who has expressly announced to his counsel an intent to commit perjury "has been extensively debated, but by no means resolved, by several courts and many commentators." 744 F.2d at 1327. (Pet. App. A5.) At the risk of oversimplification, two schools of thought have participated in a heated tug-of-war that has produced intellectual rope burns among members of the bench and bar. A confidentiality-at-all-costs school argues that the adversary system requires strict adherence to principles of confidentiality even when an attorney is faced with a perjury-determined client.[8] *See* Freedman, *Professional*

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[8]See e.g., Callan and David, *Professional Responsibility and the Duty of Confidentiality: Disclosure of Client Misconduct*

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Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions, 64 Mich. L. Rev. 1469, 1477-80 (1966). A truth-in-justice school argues that loyalty to the truthfinding goal of the adversary system overrides notions of confidentiality when a client seeks to defraud the court. Noonan, *The Purposes of Advocacy and the Limits of Confidentiality.* 64 Mich. L. Rev. 1485, 1492 (1966).[9]

The State of Iowa has taken sides in this controversy by placing strong emphasis on the truthfinding function of the adversary process. Perjury is a serious crime in Iowa. Iowa Code section 721.1 (1977), now codified as section 720.2 (1985). Under Iowa case law, a client who perjures himself acts outside the attorney-client relationship and is thus not entitled to the impenetrable cloak of confidentiality urged by the Freedman school. *Committee on Professional Ethics, Etc. v. Crary,* 245 N.W.2d 298, 306 (Iowa 1978). If the attorney "procures" false testimony at trial by questioning a witness knowing that the witness will make a false statement, the attorney could face crim-

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in an Adversary System, 29 Rutgers L. Rev. 332, 394 (1976); Freedman, *Judge Frankel's Search for Truth,* 123 U. Pa. L. Rev. 1060 (1975); Curtis, *The Ethics of Advocacy,* 4 Stan. L. Rev. 3 (1951); *American Bar Association Project of Standards Relating to the Defense Function,* § 7.7 (Approved Draft 1971).

[9]See e.g., Wolfram, *Client Perjury,* 50 So. Cal. L. Rev. 809 (1977) (withdraw-and-inform sanctions even in criminal case); Frankel, *The Search for Truth, An Umpired View,* 123 U. Pa. L. Rev. 1031 (1975); Drinker, *Some Remarks on Mr. Curtis' "The Ethics of Advocacy",* 4 Stan L. Rev. 349, 351 (1952); *American Bar Association Model Rules of Professional Conduct* § 3.3 (1983), Comment (if withdrawal will not remedy the situation, the advocate should make disclosure to the court).

inal prosecution for suborning perjury.[10] Iowa Code section 721.2(A)7, now codified as section 720.3 (1985).

The Iowa Code of Professional Responsibility, promulgated by the Iowa Supreme Court pursuant to state law, Iowa Code section 602.1206(19) (1985), sets forth a number of important provisions regulating attorney conduct when faced with a perjury-determined client. An Iowa attorney is admonished to advocate zealously the cause of a client "within the bounds of the law." Iowa Code of Professional Responsibility, Canon 7 (1985). The Disciplinary Rules accompanying the zealous representation canon direct that "a lawyer shall not . . . knowingly use perjured testimony or false evidence." DR 7-102(A)(4). While Canon 4 states that a lawyer should "preserve the confidences and secrets of a client," the Disciplinary Rule accompanying the Canon allows a lawyer to reveal "the intention of his client to commit a crime [perjury] and the information necessary to prevent the crime." Canon 4 DR 4-101(C)(3). In light of Iowa's strong judicially and legislatively expressed policy against perjury, it is not surprising that the State Supreme Court praised the Respondent's attorneys "for the high ethical manner" in which they handled Whiteside's perjury scheme. *State v. Whiteside,* 272 N.W.2d at 471. (Pet. App. A38.)

It is tempting to dive headlong, as did the Court of Appeals, into the treacherous intellectual currents generated by the ethical controversy. The Petitioner believes

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[10]Whether criminal sanctions are appropriate where a lawyer presents perjured testimony has been subject to academic debate. *See* Wolfram, *supra* note 9, at 815 n. 25.

that Iowa has resolved the client prejury dilemma in the best possible way. Resolution of any constitutional questions presented by withdraw-and-inform admonitions, however, does not require determination of what the Court might perceive as the optimal method of accommodating the truthfinding and confidentiality interests.[11] The question is whether the State of Iowa, consistent with the due process clause of the Fourteenth Amendment, may choose to employ pretrial withdraw-and-inform admonitions in its balancing of the truthfinding and confidentiality interests implicated by the client perjury dilemma in a pretrial setting.

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[11]The states have taken differing approaches to the client perjury issue. In Florida, the applicable Rule of Professional Responsibility expressly states that the attorney *shall* reveal the intention of his client to commit a crime to the court, which seems to apply to client perjury. Florida Code of Professional Responsibility, D-R 4-101(D)(2). Many other states at least allow attorneys to advise a court of perjury of their clients. *See e.g.*, Connecticut Code of Professional Responsibility, DR 4-101 (C)(3); Idaho Code of Professional Responsibility, DR 4-101(C) (3); Louisiana Code of Professional Responsibility, DR 4-101(C) (3); Pennsylvania Code of Professional Responsibility, DR 4-101(C)(3); Montana Code of Professional Responsibility DR 4-101(C)(3).

In contrast, Alabama allows an attorney to withdraw from employment if his client insists on committing perjury, but the code does not expressly allow a lawyer to advise the court. Alabama Code of Professional Responsibility DR 7-102(B)(1). In North Carolina, a lawyer is to withdraw "without necessarily revealing his reason for wishing to withdraw." North Carolina Code of Professional Responsibility, DR 7-102(B) (1). In the District of Columbia, the attorney is simply directed to "call upon his client to rectify" the perjury. District of Columbia Code of Professional Responsibility, DR 7-102(B) (1).

1. Pretrial withdraw-and-inform admonitions by defense lawyers to a perjury-determined client as authorized by state law do not violate a defendant's due process right to effective assistance of counsel.

The right to counsel provision of the Sixth Amendment to the Constitution simply states that "in all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense." United States Constitution, Amend. VI. No comment or controversy accompanied the Congressional proposal of the right to counsel proposal, and the ratification proceedings reveal nothing concerning its contemporary meaning. Beaney, *The Right to Counsel in American Courts* at 27 (1955).

The Judiciary Act of 1789, signed by President Washington the day before the Sixth Amendment was proposed by Congress, provides some illumination of the scope of the right to counsel. Section 35 of the Judiciary Act provides that "in all courts of the United States, the parties may plead and manage their own causes personally or by the assistance of such counsel or attorneys at law *as by the rules of the said courts respectively shall be permitted to manage and conduct cases therein.*" Act of September 24, 1789, c. 20, 1 Stat. 73, 92 (emphasis supplied). Under the approach embraced by the Judiciary Act of 1789, the right to counsel is not one of unlimited advocacy, but rather "a right to the guiding hand of counsel at every step of the proceedings," *Powell v. Alabama,* 287 U.S. at 49, consistent with the rules of the courts.

In this case, the Respondent does not assert that he did not have "the guiding hand of counsel at every step of the proceedings," or that his attorneys, who con-

ferred with him at least twenty-three times before trial (Pet. App. A77), were anything less than conscientious and well prepared. Whiteside's only claim is that his attorneys, in complying with the letter and spirit of the rules of the Iowa criminal justice system on the perjury issue, provided ineffective assistance of counsel.

The State of Iowa, however, and all the other states, surely has the authority to control its own court processes in the client perjury area. Withdrawal has been recognized as a proper response by a lawyer to a client's perjury proposal. *See ABA Model Rules of Professional Conduct* 3.3, Comment (1983). *See also McKissick v. United States,* 379 F.2d 754, 761 (5th Cir. 1967); *State v. Henderson,* 205 Kan. 231, 239, 468 P.2d 136, 141 (1970). The notion that a lawyer may also inform the court is more controversial. It would be entirely inappropriate, however, to enshrine the highly debatable confidentiality-at-all-cost approach to legal ethics in the Constitution. Our basic document embraces consensus values, not those which provoke deep philosophical debate among our best legal minds. *See Faretta v. California,* 422 U.S. 806, 817-818 (1975); *In re Winship,* 397 U.S. 358, 361 (1970).

In a persuasive law review article, Professor Wolfram summarized the strong state interests in preventing perjury in criminal trials. The foremost state concern is the accuracy of results of the criminal justice system. The adversary system simply does not, and cannot, regularly produce just results based on distorted information.[12] As this Court has noted, "Perjured relevant testimony is at

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[12]Wolfram, *supra* note 9, at 834.

war with justice, since it may produce a judgment not resting on truth." *In re Michael,* 326 U.S. 224, 227 (1945).

The risk of perjury-induced distortions is particularly high in serious criminal cases. When faced with the possibility of lengthy incarceration or even a death sentence, a perjury-inclined defendant will be more willing to risk detection in order to gain litigation advantage offered by false testimony.[13] In addition, a criminal trial offers an exceptional opportunity for effective defendant perjury. A criminal defendant has a constitutional right under the Sixth Amendment confrontation clause to be present and hear all of the government's evidence before deciding whether to testify in his own behalf. *Brooks v. Tennessee,* 406 U.S. 605, 607-12 (1972); *Pointer v. Texas,* 380 U.S. 400, 403-04 (1965). A perjury-determined defendant will thus have the advantage of hearing the entire case of the prosecution before he presents a fabricated story.[14]

The second important state interest behind antiperjury policies is the promotion of public confidence in the criminal justice system. *See In Re Winship,* 397 U.S. at 364 (reasonable doubt standard indispensible to command the respect and confidence of community in applications of criminal law). In the words of Professor Wolfram, the use of the adversary system for adjudication of disputes is predicated on the belief that the system enhances the social and political acceptability of its decisions.[15] Public acceptability is inversely related to the

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[13] *Id.,* at 813.

[14] *Id.,* at 840, n.17.

[15] *Id.,* at 833.

common perception of the frequency of perjury induced error.

Weighing the social cost of erroneous judgments and undermined confidence in the criminal justice system that results from less stringent control of perjury against the purported benefits of preserving the confidentiality of a client's proposal to commit the crime of perjury is essentially a legislative function. It does not involve close analysis of case specific adjudicative facts, but broad empirical and value-laden inquiry. *Cf. Barker v. Wingo,* 407 U.S. 514, 523 (1972) (court should not engage in legislative or rulemaking activity in speedy trial context). Iowa may reasonably conclude that the adversary system itself would be unduly eroded by perjury policies less stringent than those it has adopted. The states should not be deprived of legislative breathing room in this delicate policy area absent weighty countervailing constitutional considerations.

Sufficiently weighty constitutional concerns cannot be found in the due process guarantee of the right to counsel. The due process cases extending aspects of the right to counsel to state court proceedings are based on the constitutional policy of promoting reliable verdicts *at trial. See Powell v. Alabama,* 287 U.S. at 68-69; *Johnson v. Zerbst,* 304 U.S. at 463; *Gideon v. Wainwright,* 372 U.S. at 344-45. *See* Comment, *Effective Assistance of Counsel: The Sixth Amendment and the Fair Trial Guarantee,* 50 U. Chi. L. Rev. 1380 (1983). The Respondent's effort to use the right to counsel to defend a client's ability to commit perjury cuts dead against the fundamental constitutional mission of the right to counsel.

Any purported interest in protecting a client's personal autonomy is not of constitutional dimension. While notions of personal autonomy may provide a basis for a right to proceed *without* counsel, *Faretta v. California*, 422 U.S. at 816-17, this Court has expressly rejected attempts to allow notions of personal autonomy to structure the attorney-client relationship in the name of the Sixth Amendment. *Morris v. Slappy*, 461 U.S. 1, 13-14 (1983) (no right to meaningful personal relationships with one's lawyer); *Jones v. Barnes*, — U.S. —, 103 S.Ct. 3308, 3312, 77 L.Ed.2d 987, 993 (1983) (defense counsel does not have duty to raise every nonfrivolous issue requested by defendant). In any case, no claim has been made here that the lawyer-client discussions on the perjury issue so disrupted the attorney-client relationship that the lawyers could not mount a vigorous defense at trial. Whiteside told the state trial judge after the jury retired for deliberations that he was satisfied with the representation he received. (Pet. App. A74.)

2. The choice of withdraw-and-inform admonitions by Whiteside's lawyer was not conduct "outside the wide range of professionally competent assistance."

It might be argued that, as a matter of state law, an attorney in Iowa is not *required* to adopt a pretrial withdraw-and-inform approach when faced with a perjury-determined client. While the Iowa Supreme Court in *State v. Whiteside* strongly approved the withdraw-and-inform admonitions, it might be asserted that the opinion does not necessarily rule out other solutions. Assuming that an Iowa attorney does have a range of options under state law, it could be argued that the choice of pretrial

withdraw-and-inform admonitions by Respondent's attorney under the circumstances of this case was "outside the wide range of professionally competent assistance." *Strickland v. Washington,* — U.S. at —, 104 S.Ct. at 2069, 80 L.Ed.2d at 695. Regardless of whether the use of pretrial withdraw-and-inform admonitions in this case were a result of a state mandate or exercise of lawyers' discretion, the choice of remedy was reasonable.

The withdraw-and-inform approach has distinct advantages over other solutions to the client perjury dilemma. For instance, an attorney cannot honestly advise a client that he intends simply to withdraw from representation without explanation to the court. Most trial judges will not allow an appointed attorney to withdraw on the eve of trial without a compelling reason. *See State v. Taylor,* 211 N.W.2d 264, 267 (Iowa 1973). When forced with a judicial inquiry into the reason for withdrawal, it will not be sufficient for counsel to offer the vague explanation that the lawyer and client are at odds over defense strategy. *See Morris v. Slappy,* 461 U.S. at 12-13. If the lawyer refuses to be more specific, the nebulous reason for seeking withdrawal will telegraph the character of the problem to an experienced trial judge. *Lowery v. Cardwell,* 575 F.2d at 730-31.

It is sometimes proposed that an attorney confronted with a perjury-determined client should allow the client to testify as he or she wishes without the guidance of counsel. *See ABA Project on Standards for Criminal Justice, Standards Relating to the Prosecution and the Defense Function,* § 7.7 (Approved Draft 1971). Under this "free narrative" approach, the lawyer does not di-

rectly question the client about the subject area, and the lawyer refrains from making reference to the perjured testimony in closing arguments. *Thornton v. United States,* 357 A.2d 429, 436-38 (D.C. App. 1976). Such an awkward evidentiary presentation is not likely to be to the advantage of the lawyer's client at trial. It will alert most judges and many jurors to counsel's concerns about the accuracy of client testimony.[16] *See ABA Model Rule of Professional Conduct* 3.3, Comment. (Pet. App. A18.)

In addition, the prosecutor may object to the manner in which the testimony is being presented. The general rule in Iowa and elsewhere is that the decision whether to permit such a narrative rests with the sound discretion of the judge. *See* Fed. R. of Evid. 611; Iowa R. of Evid. 611(a); McCormick, C., *Law of Evidence,* § 5, at 7 (E. Cleary, 2d ed. 1972). The trial judge could simply refuse to allow the witness to testify in a narrative fashion. *Hutter Northern Trust v. Door County Chamber of Commerce,* 467 F.2d 1075, 1078 (7th Cir. 1972). In the alternative, the judge might well ask defense counsel to explain why the unusual procedure is necessary. In either circumstance, the effort to insulate the perjury-determined client from system-imposed inquiry will be defeated.

Finally, the quality of advocacy offered by the defense counsel will suffer under the free narrative solution. First, without the specific interrogation and guidance of an attorney's questions, the untrained defendant may unwittingly expose himself to devastating cross-examination by unnecessarily opening dangerous areas in direct

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[16] *Id.,* at 850.

testimony. Second, an inarticulate client's free flow narrative may be so incoherent that it has a negative impact on a jury looking for a reasonable explanation for highly suspicious circumstances. Third, the ability of the lawyer to marshal convincingly the evidence in his closing argument, an extremely important stage at a jury trial, *see Herring v. New York,* 422 U.S. 853, 862 (1975), will be compromised by his client's dogged exercise of his claimed right to testify falsely. Given these risks and problems, an attorney better serves his client by persuading him or her not to commit perjury through strong admonitions in the privacy of pretrial consultations than by simply allowing the client to jump off the perjury precipice with the unjustified hope of landing safely in the outstretched arms of a sympathetic jury.

The final potential solution is that the lawyer should proceed to elicit the testimony from his client, even if the attorney knows it is false, and fully argue the fabrication to the jury. This is clearly not a permissible resolution under Iowa state law. *See* Iowa Code section 720.3 (1985). Certainly, the Sixth Amendment does not deprive Iowa of the authority to refuse to allow its lawyers knowingly to turn its courtrooms into theaters of attorney assisted fantasy.

Even if the theatrical approach were available, it would not have been a wise strategic choice in this case. Whiteside's attorneys obtained a good result for their client. They were able to persuade the jury to convict their client only of second degree murder, even though the record unequivocally established a basis for a first degree murder conviction. Had he brazenly claimed to

have actually seen a gun, the jury might not have been so lenient. Instead of attacking his lawyers, Whiteside should be thanking them for talking him out of his foolish scheme. Had his attorneys been less persuasive, Whiteside might now be serving a mandatory lifetime prison sentence for first degree murder, Iowa Code Section 690.2 (1977), instead of the forty year maximum sentence that was actually imposed. *State v. Whiteside,* 272 N.W.2d at 468. Their successful, confidential pretrial admonitions cannot be considered ineffective assistance of counsel under *Strickland.*

3. A constitutionally based "right to testify" is not violated when an attorney pursuant to the rules of a state criminal justice system prevents a client from committing perjury.

In addition to its ineffective assistance of counsel holding, the Court of Appeals held that "counsel's action impermissibly compromised appellant's right to testtify in his own defense by conditioning continued representation by counsel and confidentiality upon appellant's restricted testimony." 744 F.2d at 1329. (Pet. App. 12.) This holding reasonably may be construed to mean that whenever a lawyer threatens to withdraw in order to prevent a client from committing perjury, or for any reason relating to the client's wishes with respect to his own testimony, a constitutional violation occurs. The Court of Appeals conceded that the right to testify is not specifically expressed in the Constitution or the Bill of Rights, but found it implicit "in the fifth and fourteenth amendments' due process guarantees" and in the Sixth Amendment's "guarantee of the right to meet and confront

accusations, to be present and to present evidence and witnesses on one's behalf, including the right to present oneself as a witness." 744 F.2d at 1329-1330. (Pet. App. A12.)

A hundred years ago, a defendant in a criminal proceeding in Iowa was not a competent witness to testify on his own behalf. *State v. Laffer*, 38 Iowa 422 (1874). This restrictive rule was not necessarily prosecution oriented, for it was designed, in part, to prevent jurors from drawing adverse inferences from the exercise of a defendant's Fifth Amendment rights. *See Ferguson v. Georgia*, 365 U.S. 570, 586-90 (1961). In 1878, Iowa, following a national trend, legislatively repealed the prohibition against a defendant taking the stand in his own behalf. 17 G.A. Ch. 168 § 1 (1978).

This history demonstrates that if there is a constitutional right to testify on one's own behalf, it is a relatively recent development. A number of lower court cases have adhered to the view that a criminal defendant has no constitutional right to testify on his or her own behalf.[17] Recent cases of this Court, however, appear to assume a constitutional right to testify. In *Harris v. New York*, the statement is made that "every defendant is privileged to testify in his own defense, or to refuse to do so." 401 U.S. at 225. Similar passing observations may be found in

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[17]*See Sims v. Lane*, 411 F.2d 661 (7th Cir. 1969), *cert. denied* 396 U.S. 943 (1969); *Sims v. State*, 246 Ind. 660, 208 N.E. 2d 469 (1965); *State v. Hutchinson*, 458 S.W.2d 553 (Mo. 1970) (en banc). *But see People v. Robles*, 2 Cal.3d 205, 85 Cal.Rptr. 116, 466 P.2d 710 (Cal. 1970); *Hughes v. State*, 513 P.2d 1115 (Alaska 1973); *State of Arizona v. Nobel*, 514 P.2d 460 (Ariz. 1973).

Faretta v. California, 422 U.S. at 819 n.15 and *Brooks v. Tennessee,* 406 U.S. at 612.

Assuming there is a right to testify of constitutional dimension, it is difficult to see how it was violated under the facts and circumstances of this case. A witness in a criminal trial, including the defendant, does not have a constitutional right to testify about anything he or she wishes. The testimony of the defendant is subject to numerous restraints such as relevance, the hearsay rule, and other concepts of admissibility. *See United States v. Bailey,* 444 U.S. 394, 415 (1980); *United States v. Bifield,* 702 F.2d 342, 350 (2nd Cir. 1983), *cert. denied* 461 U.S. 931 (1983). Similarly, a criminal defendant's privilege to testify does not include the right to commit perjury. *Harris v. New York,* 401 U.S. at 225.

A defendant cannot insist on committing blatant perjury and demand the appointment of a lawyer willing to allow use of patently false testimony. If a defendant insists on committing perjury, he or she has, in effect, refused to participate in the adversary system. Having declined to abide by its basic rules, the perjury-determined client, at least where the accused has announced expressly to his or her lawyer the intention to commit perjury, waives the right to assistance of counsel. If the accused repeatedly and stubbornly persists in perpetrating a deliberate fraud upon the court, no constitutional problem is raised by requiring him to defend *pro se* once he has been fully advised of the consequences of his action. *Faretta v. California,* 401 U.S. 806 (1975). *See ABA Model Rules of Professional Conduct* 3.3, Comment (de-

liberate abuse of right to counsel may be waiver of right to future representation).

4. Withdraw-and-inform admonitions by defense lawyers to prejury-determined clients do not violate due process of law.

The Court of Appeals vaguely states that counsel's action "deprived appellant of due process" as well as effective assistance of counsel. *Whiteside v. Scurr*, 744 F.2d at 1328. (Pet. App. A9.) The contours of the Court's due process theory are not explored. Apparently, the Court of Appeals believes a defendant may attack his state court conviction in federal court on due process grounds if it can be demonstrated only that the defendant's lawyer confidentially advised the defendant that if he or she insisted upon committing perjury, the lawyer would be required to withdraw and/or inform the court.

There is nothing unfair, however, with a lawyer privately insisting that his client tell the truth at trial and privately warning the client of potential legal consequences if he or she persisted in the perjury plan. The private counseling setting contrasts sharply with scenarios where other important participants in the judicial process become informed, against a client's wishes, of proposed perjury. For instance, if an attorney *at trial* is forced by his client's unexpected prejury to rise and advise the court of his client's false testimony, fundamental fairness might require the court to declare a mistrial. *See Holloway v. Arkansas*, 435 U.S. at 487 n.11. Under these circumstances, the declaration to the court by the defendant's lawyer that his client was committing perjury might be considered too prejudicial to allow the proceedings to con-

tinue. *See Lowery v. Cardwell,* 575 F.2d at 731. At this point, the defendant would face possible prosecution for perjury in addition to retrial on the original criminal charge. Because Whiteside followed his lawyer's advice, however, this difficult situation did not arise.

It also cannot be argued that a lawyer's successful effort to persuade his client not to testify falsely amounted to exclusion of evidence at trial in violation of due process based on the theory that the jury might have been fooled. Such a "sporting theory of justice" was expressly rejected in *Brady v. Maryland,* 373 U.S. 83, 90-91 (1963). Even when evidence is improperly withheld from the fact-finder, a conviction may be reversed on due process grounds only if the accuracy of the determination of guilt or innocence of the accused is drawn in question. *United States v. Agurs,* 427 U.S. 97, 108, 111-112 (1976). The exclusion of perjured testimony, however, cannot by definition be said to impeach the reliability of the jury's verdict.

B. The Additional Admonition Of Whiteside's Attorney That If His Client Persisted In His Perjury Plan, The Lawyer "Might Be Allowed To Impeach" His False Testimony Is Not Constitutionally Defective.

The Court of Appeals seemed especially irritated by the additional admonition by one of Whiteside's lawyers that if he committed the crime of perjury, the attorney "probably would be allowed to impeach that particular testimony." (Pet. App. A85.) The panel interpreted this statement as a "threat to testify" against Whiteside if he took the stand and committed perjury. 744 F.2d at 1329 (Pet. App. A11.)

The Court's holding that the "threat to testify" undermines Respondent's criminal conviction is erroneous. Initially, the Court's characterization of the attorney's words as a "threat to testify" is doubtful. The statement easily can be construed not as a threat by the lawyer to actually take the stand as a rebuttal witness but simply to correct by cross examination of his own client any misimpressions that might result through false testimony. *See United States v. Petsas,* 592 F.2d 525, 527 (9th Cir. 1979) *cert. denied* 442 U.S. 910 (1979).

From the narrow prospective of client self-interest, impeachment through questioning by his own lawyer, with opportunities for self correction, is often far preferable than exposure to cross-examination by a professional prosecutor. A strategy decision to attempt to correct false testimony in this case would not be an act of counsel outside the wide range of competent assistance in light of the fact that none of the three eyewitnesses to the crime saw a gun (App. 19, 39, 44) and no weapon was discovered in a police search of the victim's apartment shortly after the incident occurred. (App. 26.)

The Court of Appeals apparently believed that counsel was proposing to represent Whiteside at trial, then suddenly and dramatically switch to the prosecution side against his client as a "rebuttal witness" in the same proceeding. 744 F.2d at 1328. (Pet. App. A9.) A musical chairs procedure which allows a defense attorney to abandon his client at trial in full view of the factfinder and testify against him on veracity questions would give rise to a strong due process attack on any subsequent conviction.

Robinson, however, wanted no part of musical chairs. If his client insisted on perjury, Robinson announced in advance of trial that he wanted absolutely no role in it. If Whiteside wanted to proceed with his perjury plan, Robinson told him in no uncertain terms, he would ask permission to withdraw before trial. (Pet. App. 88.) He was seeking to avoid the musical chairs by refusing in advance to sit at the counsel table at trial.

Of course, Whiteside could have attempted to manipulate his lawyer into a difficult position by concealing his intent to commit perjury until he took the stand at trial. If Whiteside had surprised his attorney with perjured testimony, however, the trial would not likely have proceeded to judgment if Robinson acted according to his admonitions. Robinson would have moved to withdraw, informed the court of his reason, and a mistrial likely would have occurred. *McKissick v. United States,* 398 F.2d 342, 344 (5th Cir. 1968). Thus, if Robinson were to be a witness in *any* proceeding against Whiteside, it would not have been one in which he had also appeared before the factfinder as Whiteside's lawyer.

Under Iowa law, Whiteside's lawyers, if they had been forced to withdraw from representing Whiteside, later could have been subpoenaed by the prosecution to appear at a subsequent trial and forced to reveal communications regarding Whiteside's perjury plan. In Iowa, statutory attorney client privilege, Iowa Code section 622.10 (1985), does not include knowledge of client perjury within its scope. *Committee on Professional Ethics, etc. v. Crary,* 245 N.W. at 306. If Whiteside had actually taken the stand and testified falsely, no state law barrier would prevent his former lawyers from being allowed to impeach his false testimony.

It could be argued that whatever the scope of attorney-client privilege under state law, an attorney-client privilege of constitutional dimension emanates from the Sixth Amendment right to counsel. Where a client reveals to a lawyer facts and circumstances related to a crime, some degree of attorney-client privilege may be constitutionally required in order to afford full protection to the client's Fifth Amendment privilege against self incrimination. In no case to date, however, has this Court identified a generally applicable constitutionally protected attorney-client privilege. *See Maness v. Meyers,* 419 U.S. 449, 467 n.15 (1975). The several state courts that have addressed the issue have held that the attorney-client privilege is without constitutional dimension.[18] Even if some aspects of attorney-client privilege are constitutionally protected, the constitutional cloak does not extend to confidences regarding firm intentions to commit a future crime, including the crime of perjury at a criminal trial.

In sum, the lawyer's qualified admonition that he "probably would be allowed to impeach" his client's false testimony if he insisted on committing perjury was thus nothing less than an accurate statement of Iowa and constitutional law. A failure to warn Whiteside of this potential consequence would have raised a serious question of ineffective assistance of counsel.

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[18] *In re Investigation to Locate Jane Doe,* 101 Misc.2d 388, 420 N.Y.S.2d 996, 998 (1979); *Harrison v. Maryland,* 276 Md. 122, 345 A.2d 830, 837 (1975). *See also Magida, ex rel. Vulcan Detinning Co. v. Continental Can Co.,* 12 F.R.D. 74, 76 (S.D. N.Y. 1975) *aff'd* 231 F.2d 843 (2d Cir.), *cert denied* 351 U.S. 972 (1956); Comment, *Attorney-Client Privilege,* 91 Harv.L. Rev. 464, 485-86 (1977).

C. Because The Respondent Did Not Remember, Let Alone Rely Upon, His Lawyer's Inform And Impeach Admonitions, They Do Not Provide A Basis For Federal Reversal Of Respondent's State Court Conviction.

The record reveals that the Respondent did not seem to remember, let alone rely upon, his lawyer's warning that he would advise the court or be allowed to impeach if he persisted in his perjury plan. At the hearing on his post-trial motion for a new trial. Whiteside recalled only that his attorney indicated he would withdraw if the perjury plan were pursued. Whiteside testified:

> Q: Did you go over the questions that Mr. Robinson would ask you at trial, before the trial?
>
> A: Yes.
>
> Q: And as you went over the questions, did the two of you come into conflict with regard to whether there was a weapon?
>
> A: I couldn't — I couldn't say a conflict. But I got the impression at one time that maybe if I didn't go along with — with what was happening, that it was no gun involved, maybe that he would pull out of my trial.

(Pet. App. at A70.)

At no time did Whiteside mention the admonition to inform the court or the so-called "threat to testify" as a reason for abandonment of his perjury plan. Just as philosophers tell us there is no sound in the forest when no one hears the crash of a fallen tree, no adverse impact, *Cuyler v. Sullivan*, 446 U.S. at 549, can possibly be traced to a lawyer's admonitions that are not communicated to a listening client.

CONCLUSION

In this case, the Respondent expressly informed his lawyers that he intended to testify falsely on the stand at his upcoming murder trial. His lawyers gave strong admonitions to the client in a confidential pretrial conference. Fortunately for both the lawyers and their client, Whiteside abandoned the perjury plan. Whiteside's lawyers then zealously advocated their client's cause at trial, where he took the stand to testify fully in his own defense.

The only impact of the admonitions at trial was the defeat of the proposed perjury plan. After the jury retired, the defendant expressed satisfaction with his lawyers' performance. Whiteside sought vacation of his conviction by challenging the conduct of his lawyers only after the verdict was rendered.

The conviction must be upheld. Whiteside has no constitutional right to commit perjury. *Harris v. New York,* 401 U.S. 222, 225 (1981). The admonitions of Whiteside's attorneys had utterly no impact on the reliability of the factfinding process. Any alleged error in the precise wording of the admonitions, therefore, does not provide a basis for reversal. *United States v. Morrison,* 449 U.S. 361, 364 (1981).

In any case, the lawyers' admonitions were entirely appropriate and cannot be considered conduct "outside the wide range of professionally competent assistance." *Strickland v. Washington,* — U.S. —, 104 S.Ct. 2052, 2069, 80 L.Ed.2d 674, 698 (1984). The admonitions were consistent with valid state law designed to inhibit perjury in Iowa courtrooms. *State v. Whiteside,* 272 N.W.2d 468, 470 (Iowa 1978).

Whiteside has succeeded in putting his attorneys on trial because of their high ethical standards without demonstrating anything other than the fact that they forced him to tell the truth at trial. This parody should be put to an end by reinstating his conviction.

For all the above reasons, it is urged that the judgment and opinion of the Court of Appeals must be reversed

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